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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of KRISTINE E. and LARRY G. DeBARGE.	
KRISTINE E. DeBARGE, Respondent, v. LARRY G. DeBARGE, Respondent; ORANGE COUNTY DEPARTMENT OF CHILD SUPPORT SERVICES, Appellant.	G037773 (Super. Ct. No. 94D11399) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Lon F. Hurwitz, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

. Edmund G. Brown, Jr., Attorney General, Thomas R. Yanger, Senior Assistant Attorney General, Paul Reynaga, Supervising Deputy Attorney General, and Sharon Quinn, Deputy Attorney General, for Appellant.

No appearance for Respondent Kristine E. DeBarge.

No appearance for Respondent Larry G. DeBarge.

The Orange County Department of Child Support Services (DCSS) appeals from an order that directed Larry G. DeBarge, Kristine E. DeBarge, and Michael DeBarge, a minor, to submit to genetic testing to determine if Larry is the child's father. DCSS argues the superior court has no jurisdiction to order genetic testing where, as here, a dissolution judgment establishing paternity has been neither challenged nor set aside. We agree and reverse.

* * *

In November 1994, Kristine filed a dissolution petition that alleged the couple had one child, Michael, born in August 1992. Larry was served by mail in Las Vegas, Nevada, but failed to answer, and Kristine filed a request to enter default, along with proof of service by mail.

Judgment of dissolution was entered by default in April 1995. It found that Michael was a child of the marriage, and Larry was ordered to pay child support through the Orange County District Attorney, Family Support Division. Notice of entry was mailed to Larry by the county clerk.

In May 2006, Larry moved to terminate child support and release his driver's license. In an accompanying declaration, he said he had recently moved back to California, where "the DCSS is making my life difficult trying to hold me responsible for a child that is not mine." He declared he had been sterilized in 1986, attaching a consent to sterilization form. Part of the form is a 'physician's statement," signed and dated March 24, 1986, that states "shortly before I performed a sterilization operation upon Larry DeBarge on 3/21/86, I explained to him the nature of the sterilization operation, [a] bilateral vasectomy, the fact that it is intended to be a final and irreversible procedure and the discomforts, risks and benefits associated with it." Larry also urged he could not be Michael's biological father because the couple had separated a few months after they married, and he had never admitted Michael was his son. Paternity testing was requested.

Both DCSS and Katherine opposed the motion. They took the position DCSS argues in this appeal, which we will address shortly. Katherine also declared the parties had lived together after marriage and during the time they conceived Michael, including residing in Las Vegas before they split up and she returned to California. She said that after the child was born, "Larry told family and friends that Michael was his son."

At a hearing on the motion, Larry produced a letter he claimed showed he was in jail in Kentucky when Michael was conceived. The letter was not admitted in evidence, nor does a copy appear in the record. A transcript of the hearing indicates the letter was shown to counsel for DCSS, who said it recited "an intake date to incarceration of August 16, 1991 [and] a release date of November 4, 1991. That would not make it impossible for the child to be conceived after the period that Mr. DeBarge . . . [claims] he was incarcerated." Larry responded that he did not return to California until December 22, 1991, so "simple math shows there is no way I can be the father." The trial judge granted the request for genetic testing "pursuant to Family Code section 7551, since paternity is in issue." A formal order directed Larry, Kristine, and Michael to submit to genetic testing.

DCSS argues genetic testing cannot be ordered while there is a valid judgment of paternity and no grounds have been shown to set aside the judgment. It also contends that a new statute authorizing postjudgment paternity testing does not apply to this case. We agree.

A judgment that includes a finding of paternity is res judicata and precludes relitigating the issue, unless and until the judgment is set aside. (See, e.g., *City and County of San Francisco v. Stanley* (1994) 24 Cal.App.4th 1724, 1729 ["We have found no authority . . . for the proposition that a parent may use a motion to modify child support as a vehicle to reopen the issue of paternity once a final judgment of paternity has been rendered."]; *Brown v. Superior Court* (1979) 98 Cal.App.3d 633, 636 ["a paternity

determination in an interlocutory decree of dissolution was res judicata on the issue in the absence of extrinsic fraud or extrinsic mistake."].)

There are two exceptions to this rule, one judicial and the other statutory. *County of Los Angeles v. Navarro* (2004) 120 Cal.App.4th 246 set aside a default paternity judgment without requiring a showing of extrinsic fraud or mistake, where the putative father claimed he had never been served and the county admitted he was not the father (based on the results of genetic testing in a related case). The court balanced what it saw as the competing policies: "Sometimes even more important policies than the finality of judgments are at stake, however. Mistakes do happen, and a profound mistake occurred here . . . ." (*Id* at p. 249.) It concluded that ensuring finality of judgments was outweighed by the county's ethical obligation to correct an erroneous support order, which might result in seized assets, prevent one from earning a living, and destroy family relationships. (*Ibid*.)

The statutory exception is found in Family Code sections 7645 to 7649.5, enacted in 2004, which allows certain paternity judgments to be set aside based on genetic testing.[1] In relevant part, the new procedure is as follows. "Notwithstanding any other provision of law, a judgment establishing paternity may be set aside or vacated upon a motion . . . if genetic testing indicates that the previously established father of a child is not the biological father of the child." (§ 7646, subd. (a).) A supporting declaration must state the specific reasons why the moving party believes he is not the biological father (among other things), but the moving party is not required to offer evidence of a paternity test in order to bring the motion. (§ 7647, subd. (a)(2)(C).) However, the remedy does not extend to all paternity judgments: "For purposes of this article, 'judgment' does not include a judgment in any action for marital dissolution, legal separation, or nullity." (§ 7645, subd. (b).)

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[1] All subsequent statutory references are to the Family Code.

A case decided after the statutory exception was enacted concluded that it supersedes the judicial one carved out in *Navarro*. Referring to section 7645 et seq., the court explained that "[i]n light of this comprehensive statutory scheme for setting aside a judgment of paternity when otherwise established procedural rules would not permit relief . . . [t]he amorphous equitable considerations and general policies relied on in *Navarro* must give way to the later enacted detailed procedure." (*County of Fresno v. Sanchez* (2005) 135 Cal.App.4th 15, 19-20.)

In this case, Larry was not entitled to genetic testing. The dissolution judgment that established his paternity is res judicata – a final judgment that is conclusive on the issue and not subject to collateral attack. No basis to set aside the judgment was argued, let alone proven. Larry does not claim the dissolution judgment was entered as a result of fraud or mistake, extrinsic or otherwise. Nor does he assert newly discovered evidence. Larry's argument is based on facts known to him at the time of the 1994 dissolution action – his alleged 1986 sterilization and the assertion he was not living with Kristine when Michael was conceived. Having decided not to contest paternity in the dissolution proceeding, Larry cannot do so now. The issue of paternity is no longer in dispute, having been established by the dissolution judgment. The request for genetic testing should have been denied. (*City and County of San Francisco v. Stanley*, *supra*, 24 Cal.App.4th 1724; *Brown v. Superior Court, supra,* 98 Cal.App.3d 633.)

The trial court overlooked the binding dissolution judgment when it relied on section 7551 to order genetic testing. Section 7551 provides that genetic testing may be ordered "[i]n an action or proceeding in which paternity is a relevant fact . . . ." But paternity has already been established by the dissolution judgment, it is no longer in issue. As the court explained in a recent case, "[s]ince the only conceivable relevance that blood testing could have . . . is to whether or not Stanley is in fact the biological father, the court abused its discretion in ordering blood testing where the issue of

paternity was already determined." (*City and County of San Francisco v. Stanley, supra*, 24 Cal.App.4th at p. 1729.) So, section 7551 does not justify the instant order for genetic testing.

Nor can the order be sustained on the authority of *County of Los Angeles v. Navarro, supra*, 120 Cal.App.4th 246. Assuming, without deciding, that *Navarro* remains good law, it is distinguishable. There, the putative father claimed he had never been served in the dissolution action, he moved to set aside the default, and most significantly, the county agreed he was not the father of the children in question. None of those key facts appear here – Larry had not moved to set aside the dissolution judgment on any ground, he does not deny service, and DCSS insists Larry is obligated for child support as the father of Michael. So the public policy exception to the finality of paternity judgments – if one exists – does not help Larry.

Finally, Larry cannot rely on the new statutory procedure for setting aside a paternity judgment based on genetic testing. By its terms, the procedure does not apply to a "judgment in any action for marital dissolution." (§ 7645, subd. (b).) Since paternity in this case *was* established by the 1994 dissolution judgment, the remedy provided in section 7646 is unavailable.

Since no basis for genetic testing has been shown, the order appealed from is reversed. Appellant is entitled to recover costs on appeal from respondent Larry G. DeBarge.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

ARONSON, J.